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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/575,297	04/11/2006	Bernd Schessl	2003P01288WOUS	3142
46726 7590 12/27/2010 BSH HOME APPLIANCES CORPORATION INTELLECTUAL PROPERTY DEPARTMENT 100 BOSCH BOULEVARD NEW BERN, NC 28562				
EXAMINER CASTELLANO, STEPHEN J				
ART UNIT 3781		PAPER NUMBER		
NOTIFICATION DATE 12/27/2010		DELIVERY MODE ELECTRONIC		

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/575,297
Filing Date: April 11, 2006
Appellant(s): SCHESSL ET AL.

Andre Pallapies
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed November 9, 2010 appealing from the Office action mailed May 28, 2010.

(1) Real Party in Interest

The examiner has no comment on the statement, or lack of statement, identifying by name the real party in interest in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The following is a list of claims that are rejected and pending in the application:

Claims 13-24, 31 and 32 have been rejected.

Claims 13-32 are pending.

(4) Status of Amendments After Final

The examiner has no comment on the appellant's statement of the status of amendments after final rejection contained in the brief.

(5) Summary of Claimed Subject Matter

The examiner has no comment on the summary of claimed subject matter contained in the brief.

(6) Grounds of Rejection to be Reviewed on Appeal

The examiner has no comment on the appellant's statement of the grounds of rejection to be reviewed on appeal. Every ground of rejection set forth in the Office action from which the appeal is taken (as modified by any advisory actions) is being maintained by the examiner except for the grounds of rejection (if any) listed under the subheading "WITHDRAWN REJECTIONS." New grounds of rejection (if any) are provided under the subheading "NEW GROUNDS OF REJECTION."

(7) Claims Appendix

The examiner has no comment on the copy of the appealed claims contained in the Appendix to the appellant's brief.

(8) Evidence Relied Upon

Patents:

5,480,035	SMITH	1-1996
5,027,959	LUUKKONEN	7-1991
4,735,325	REMMERS	4-1988

Official Notice and Prior Art Admissions:

Official notice was taken that racks of plastic are well known in the non-final Office action mailed January 6, 2010. The Official notice was treated as a prior art admission in the final Office action mailed May 28, 2010.

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Issue A:

Claim 32 is rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the enablement requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to enable one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention. The holding element 5 is a part of the fixing ladder 4. The holding element 5 has only two horizontally aligned arms, each arm extending inside the framework and including a hook-shaped member to support a pivot pin. However, the holding element 5 has only one height position when a fixing ladder remains secured to the framework. The holding element 5 only supports the rack in one position. When a rack 3 is supported by a holding element 5 that remains secured to the framework, the rack 3 is not capable of moving between multiple or different height positions of the holding element. On the other hand, when the holding element 5 is unsecured, the assembly of the fixing ladder 4 with its holding element 5 and rack 3 can be physically detached and reattached in a different height position.

This is a lack of enablement rejection.

Issue B:

Claims 13-20 and 22-24 are rejected under 35 U.S.C. 102(b) as being anticipated by Smith (5480035).

Smith discloses a crockery basket comprising a framework (dishwasher rack), the framework including a common edge (the edge provided by the middle additional wire 15), at least one rack (shelf 20) and a plurality of holding elements (plates 22 or component parts of the plates) hold the rack at different height positions on the basket, both holding elements are secured on the common edge along a single side (the right side or half as shown in Fig. 1, this is more than just the right wall) of the framework (the framework has two sides a right side and a left side).

Re claims 13-17 and 22-23, a group of holding elements is defined by (hubs 50, 51 on the plates or end caps 22). The holding elements are indirectly secured on the common edge as the holding elements are attached to plate 22 much like the holding elements 5 are indirectly secured on the common edge because they are secured to fixing ladder 4. A first group of holding elements (first device) is provided on a first end cap 22 and a second group of holding elements (second device) is provided on a second end cap 22. The groups of holding elements on an end cap 22 are configured as a fixing ladder with one holding element located above another to make the height of the shelf adjustable. The common edge is the edge formed by the wire 15 that extends around the circumference of the framework (all four sidewalls).

Re claim 23, the mechanical stop on the rack of Smith is the corresponding abutting surfaces of the rack which abut with ribs 56, 57 as shown in Fig. 5-7 of Smith.

Re claim 18-20 and 24, insofar as disclosed by applicant the horizontal meshes merely need to be horizontal members. Smith discloses horizontal meshes 15 arranges one above the other, the rack has fixing structure as the bars or wires of the rack are fixed to the holding elements which engage the horizontal meshes.

Re claim 24, the at least one of the first device and the fixing structure has a mechanical stop (ribs 56, 57 of the end cap 22) that engages abutting surfaces of the rack for assisting the support of the rack in a substantially horizontal position (see col. 4, lines 3-7 and Fig. 2-3 and 5-7).

Issue C:

Claim 21 is rejected under 35 U.S.C. 103(a) as being unpatentable over Smith.

Smith discloses the fixing structure of the rack and the first device made of plastic as col. 3, lines 12-16 discuss the polypropylene material of the first device. Smith discloses the invention except for the plastic material of the fixing structure of the rack. Official notice was taken that racks of plastic are well known in the non-final Office action mailed January 6, 2010. The Official notice is now treated as a prior art admission. It would have been obvious to modify the material of the rack to be plastic to allow easier manufacturing by molding, to enhance durability, and to make from a readily available material.

Issue D:

Claims 13-22 and 31 are rejected under 35 U.S.C. 103(a) as being unpatentable over Smith (5480035) in view of Remmers (4735325) and Luukkonen (5027959).

Smith discloses a crockery basket comprising a framework (dishwasher rack), the framework including a common edge (the edge provided by the middle additional wire 15), at least one rack (shelf 20) and a plurality of holding elements (plates 22) hold the rack at different height positions on the basket, the holding elements are secured on the common edge. If it should be deemed that Smith fails to disclose that both holding elements are secured to a single side, then Smith can be modified by Remmers and Luukkonen.

Remmers discloses a clip 40, the clip is made from plastic and is attached to a vertical member on the framework, two clips supported on a single side (one wall, the back wall as shown in Fig. 11) will attach a shelf made of two pairs of vertically spaced wires [(24, 26) and (28, 30)] and a plurality of horizontal deck wires 32.

Luukkonen is similar to Remmers and discloses a fastening member 7 which is supported by a support bar 3 upon which it rests and the upper surfaces of the fastening member supports wire shelves as shown in Fig. 2. A fastening member is used at each corner of a wire shelf (see Fig. 1) so that a plurality of holding elements (fastening elements 7) are secured on the common edge along a single side of the framework. The holding elements (fastening elements 7) are also arranged at different heights as shown in Fig. 1.

It would have been obvious to replace the plates 22 of Smith with either the clip 40 of Remmers, the fastening element 7 of Luukkonen or a combination of the teachings of both Remmers and Luukkonen, the holding elements are secured to the right side wall of Smith to provide a plurality of holding elements being secured on the common edge along a single side (one wall) of the framework. The motivation for this combination would be to replace a bulky and obtrusive end caps 22 with a lighter, less obtrusive support (either clips 40 of Remmers or the fastening elements 7 of Luukkonen) in order to save weight to make the crockery basket more convenient to push, pull or carry and to open the space of the crockery basket so that dishwashing fluid can flow more freely through a side that had been partially blocked by an obtrusive end cap 22.

Re claim 31, Remmers' clip 40 includes two sides that define a pair of arms (one arm defined by elements 50, 54, 66, 82, 88, 100 and the other arm defined by elements 52, 56, 68, 84,

90, 102) that straddle the vertical support of the framework between rearwardly extending projections 50 and 52, each of the arms extend inside the framework and include a hook-shaped element [the portions that extend towards the front portion 44 or forwardly (e.g. 54, 66, 82, 88 and 100 for the one arm)] to support the pivot pin of the rack. Also, Luukkonen's fastening member 7 includes two sides that define a pair of arms that straddle the vertical support wire of the framework, each of the arms extend inside the framework and include a hook-shaped element to support the pivot pin of the rack.

(10) Response to Argument

Issue A:

It seems as though appellant has become confused by what the specification teaches as a fixing element 4 or holding device 10 and a holding element 5. The fixing element 4 or holding device 10 is clamped to a vertical or horizontal wire on the framework and includes several holding elements 5 aligned in vertical relationship. Several fixing elements 4 or holding devices 10 may be removably attached to the framework to hold racks 3 above a bottom surface of a basket 1. The holding element 5 is made of a pair of arms with each arm of the pair aligned horizontally with the other arm of the pair. The holding element 5 supports a proximal portion or wire of the rack 3 and allows the rack 3 to pivot about the axis of the proximal portion or wire. The holding elements are labeled in Fig. 1 and 2 of the drawings. The holding element 5 is supported by a fixing ladder 4.

Appellant is correct in stating that the rack 3 can move between different height positions of the holding element 5. However, the rack 3 and holding element 5 can only do so when the

holding element 5 is unsecured to the framework. That is, rack 3, holding element 5 and fixing element 4 can be removed as an assembly then reattached at a different height. Claim 32 clearly stipulates that the holding element 5 **remains secured** to the framework.

Appellant references Fig. 1 and 7 and states that the holding element 5 shown includes a number of pairs of arms. The examiner believes applicant means to refer to Fig. 1 and 2, the only figures which depict the holding elements 5. Each leader line which extends from numeral sign 5 splits and points to the rightmost arms of pairs of horizontally aligned arms. This indicates that each holding element is spaced vertically from the other holding elements.

Appellant compares claim 13 to claim 32. First, the language in claim 13 is different from the language of claim 32 in that claim 13 refers to holding elements (plural) rather than holding element (singular). The language of claims 31 and 32 which state that there is "at least one holding element to hold the at least one rack at different height positions" indicating that one holding element is capable of holding at least one rack at different height positions. If the minimum number of holding elements to perform the holding at different height positions functions is two, then claim 32 should have specified this.

Issue B:

Response to the unfortunate incident that appellant has made of record on two occasions:

"Unfortunately, it appears to Applicants that the Examiner has withdrawn the previous indication of allowability simply because Applicants did not choose to accept that subject matter at that time."

The above seems to accuse the examiner of rejecting claims out of spite because an examiner's amendment was not readily accepted. This identical statement appears in both the

Pre-Appeal Brief Request mailed August 18, 2010 and in Appeal Brief mailed November 9, 2010. Nothing could be further from the truth.

It is disturbing and unreasonable for appellant to have stated this on the record. The examiner is not responding in an attempt to defend himself (as the examiner is not on trial). Rather, appellant's remark seems to damage the record. Addressing these comments is an attempt by the examiner to repair the record by explaining that what has taken place is normal and proper in the course of examination. It is normal examination practice to offer allowable subject matter, to have that subject matter rejected by appellant and for the examiner to carry forward examination by continuing to search for references, evaluate references, evaluate the current claims, and make rejections. During the course of normal examination, an examiner may realize that a claim limitation which had been indicated to be allowable is broader than previously recognized and determine that a reference reads upon that limitation and the entire claim. It would not be proper under these circumstances to allow that claim simply because the examiner had previously stated it was allowable.

Re claim 13, appellant is correct in stating that the holding elements (end caps 22) of Smith are placed on opposite sides of the framework. As is shown by Fig. 1 of Smith, one end cap 22 is on the front sidewall and the other end cap 22 is on the back sidewall. However, appellant has not responded to the examiner's interpretation of Smith which states that the framework has left and right sides delineated by an axis or plane of separation extending front to back. The two end caps 22 are shown to be on the right side of the plane or right half of the framework as shown in Fig. 1. The right side includes more than just the right sidewall but also includes right half portions of the front and back walls wherein the end caps 22 are located.

Furthermore, claim 13 has open language denoted by the preamble ending with the word “comprising.” The open language allows other elements to be added. In particular, the interpretation of “a single side of the framework” doesn’t preclude a construction wherein holding elements are secured to multiple sides. It only narrows the interpretation to “at least one side of the framework.”

Appellant’s statement made at page 5 of the final Office action mailed May 28, 2010 (“If it should be deemed that Smith fails to disclose that both holding elements are secured to a single side ...”) about the examiner’s weak position is not well taken. Applying a 103 rejection to back up a 102 rejection is proper examining practice.

Re claim 23, an explicit statement has been added to direct attention to the area of the rack that forms a stop to hold the rack in a substantially horizontal position. The area that forms the stop is the corresponding abutting surfaces of the rack that abuts with the ribs 56, 57.

Re claim 24, the statement of rejection has been restated more clearly to state that the fixing structure (end cap 22) has at least one mechanical stop (ribs 56, 57) for assisting in support of the rack.

Issue C:

Appellant relies upon the dependency of claim 21 upon claims 14 and 13. Appellant adds no additional argument. Therefore, appellant relies upon the reversal of the 102 rejection.

Issue D:

Appellant states that the combination would be inappropriate because the distal end of the support rack of Smith would not be supported if this combination were to be made. However, support for the distal end of the rack is not claimed in claim 13 or claim 31. It is not believed that the modification would destroy the purpose of the invention or the purpose of the support rack. The modification removes the end caps 22 and replaces the end cap with a clip or different support. Remmers discloses a support clip 40. The clips 40 are only provided on one side and the distal end of the rack is allowed to pivot from a raised position above the clip to a horizontally supported position as shown in Fig. 11. Luukkonen discloses fastening members 7 not only at the proximal end of a rack but also at the distal end of the rack (see Fig. 1 wherein fastening members 7 are provided at the four corners of the rack). The fastening members 7 support the rack in a horizontal position.

Re claim 31, appellant has stated that there is no reason to modify. The examiner has added a clear reasoning for modifying: (1) to save weight and (2) to allow dishwashing fluid to flow more freely.

In response to appellant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

Appellant argues that Smith is mutually exclusive from Remmers and Luukkonen. However, this argument is not based on well reasoned facts. Smith, Remmers and Luukkonen are similar references that all pertain to the support of wire racks within a framework, to support the racks at different heights and to change the height of the rack to suit a consumer's needs.

Re appellant's remarks about arms extending inside the framework and including hook-shaped members, each of the arms of Remmers extend inside the framework and include a hook-shaped element [the portions that extend towards the front portion or forwardly (e.g. 54, 66, 82, 88 and 100 for the one arm)] to support the pivot pin of the rack.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/Stephen Castellano/

Stephen Castellano

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